In the Matter of:	)	
	)	**DATE ISSUED: 12/21/98**
Bruce Davis,	)	
Claimant	)	**Case No. 1998-LHC-1152**
	)	
v.	)	**OWCP No. 06-162225**
Najan Contractors,	)	
Employer,	)	
	)	
and	)	
	)	
MS Casualty Insurance Co.,	)	
Carrier,	)	
	)	

APPEARANCES:

Rebecca J. Ainsworth, Esq.
Maples & Lomax
P.O. Drawer 1368
Pascagoula, Mississippi 39568
For Claimant

John S. Gonzalez, Esq.
Daniel, Coker, Horton & Bell
P.O. Box 416
Gulfport, Mississippi 39502
For Employer/Carrier

BEFORE: C. Richard Avery
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Bruce Davis (Claimant) against Najan Contractors, (Employer) and MS Casualty Insurance Co. (Carrier.) The formal hearing was conducted at Mobile, Alabama on September 18, 1998. Each party was represented by counsel, and each presented documentary

evidence, examined and cross-examined the witnesses, and made oral arguments. The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-23, and Employer's Exhibit 1-16. This decision is based on the entire record.[1]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. Claimant injured his lower back in an accident on August 16, 1994;
2. An employer/employee relationship existed at the time of the injury;
3. The injury arose in the course and scope of employment;
4. Employer was notified of the injury on August 16, 1994;
5. A claim for compensation was filed on February 16, 1995;
6. A Notice of Controversion was not filed by Employer;
7. Claimant reached Maximum Medical Improvement on March 7, 1996;
8. An informal conference was not held;
9. Medical benefits under Section 7 of the Act were paid;
10. Claimant received payments for temporary total disability from August 17, 1994, to August 11, 1996, of a total of $48,152.50.

Unresolved Issues

The unresolved issues in this case are:

1. Causation of Claimant's injuries;
2. Nature and extent of disability, if any;
3. Claimant's average weekly wage;
4. Whether or not Employer is responsible for Claimant's medical bills; and
5. Attorney's Fees.

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[1] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages - "Tr. __, lines __"; Joint Exhibit - "JX __, pg. __"; Employer's Exhibit - "EX __, pg. __"; and Claimant's Exhibit - "CX __, pg. __".

Statement of the Evidence

Testimonial Evidence

Claimant was born March 1, 1949, graduated from high school and attended one year at Jones Junior College. Claimant additionally received training in air conditioning/refrigeration and in welding from George County Vocational Center, but did not receive certification in either field. Following three years in the Army, he has spent the majority of his life working as a welder and welder-boilermaker for a variety of employers. He has also worked as a roustabout, floor hand, and pipe welder. Based upon Claimant's best estimates, his salaries ranged from $12.50 to $13.50 an hour prior to his August 16, 1994, injury. (CX 22).

While employed as a welder at Ham Marine in 1991, Claimant sustained a neck injury resulting in neck surgery performed by Dr. Frank Cope. Claimant has no continuing problems from that injury. Then on August 16, 1994, again while employed as a welder for Najan Contractors working at Ham Marine, Claimant injured his lower back. (CX 22).

Claimant explained that on August 16, 1994, he was welding on a drilling rig and was moving three or four joints of welding by placing them over his shoulder. He rounded a corner and the joints caught on something, jerking him back and twisting his lower back. He received treatment at the first aid center at Ham Marine the day of the accident, where ice was placed on his lower back. He had x-rays taken and was sent to Dr. Thomas Dempsey. Claimant sought a second opinion from Dr. John J. McCloskey, neurosurgeon, and presented with complaints of pain in his legs and up and down the back of his legs and burning in his feet. Dr. McCloskey performed tests and re-examined Claimant on several occasions. Dr. McCloskey additionally suggested a second opinion from Drs. Robert E. Germann and Henry C. Mostellar, neurosurgeons. Eventually, Dr. McCloskey performed surgery, but Claimant felt no relief. (CX 22).

Claimant testified he is unable to stand or sit for long periods of time without pain and stiffness. Although Claimant received physical therapy at Sunbelt Therapy, it provided no relief. He has not received any further treatment for his back injury since he was placed on maximum medical improvement by Dr. McCloskey. Claimant is restricted from lifting over 35 pounds, no ladder climbing, and limited stooping and bending. (CX 22).

Following his accident, Claimant was employed at Timberland Forest Products as a boiler operator for $6.00 an hour. The job involved lifting of no more than 10 pounds, climbing only two steps of a ladder, and limited bending and stooping. He next worked for Sam Elmore's Fabrication Shop as a welder earning $9.00 an hour and the job involved lifting of about 30 pounds, no climbing, and limited bending and stooping. Following his layoff from Elmore's, Claimant obtained employment at Sun Manufacturing as a welder earning $9.00 an hour. Claimant worked for Sun Manufacturing from March, 1998, to July, 1998, and has not worked since he was laid off by Sun. The job required lifting of about 30 pounds, some bending and stooping, and no climbing. Although Claimant complained of continuing pain while working, he did not miss any days of work because of his back injury. The welding performed at Sun was different from his welding job at Najan because welding at Najan required a lot of climbing and crawling in small spaces, while the drilling at Sun did not. (Tr.52-55 & CX 22).

Following the August, 1994, injury Claimant applied for work as a truck driver for Ice Plant, Inc. and as a welder for BE&K, Foster Wheeler, American Tank, and Brown & Root, but was denied employment. Claimant attempted to regain his position at Ham Marine but was informed there were no positions available. (CX 22).

In August of 1998, a labor marker survey was conducted and a report provided to Claimant. Claimant called some of the Employer's listed in the Survey, including Specialty Marine Works and Gulf Coast Welding, to apply for welding positions but was informed there were no positions available. The report additionally listed employers who did not have immediate openings, but did periodically hire. Upon contacting several on the list, only one employer, Don Haley's Welding, agreed to forward an application to Claimant, but informed Claimant they had no immediate openings. The labor market survey also listed positions as car salesman, but Claimant explained he had no prior sales experience and has never had a job dealing with the public. Neither did he think his educational abilities would meet the requirements of a car salesman. (Tr. 19 -23).

In addition to responding to positions identified in the labor marker survey, Claimant completed an application with Port City Trailers. However, after learning of his restrictions, Claimant was told there would probably not be an appropriate position available. Since his deposition he was laid off by Sun Manufacturers and

contacted them once to see if any positions were available but was told there were none. Claimant opined he is able to work 40 hours a week and is willing to work at employment within his limitations. (Tr. 23-25).

On cross examination, Claimant admitted he did not always seek the employment positions in person, but often simply called on the phone and often told the potential employers of his restrictions. He explained that in some cases the employers were 60 miles from his home. Claimant did not remember receiving a single salary check in the amount of $1500 for gross wages from Najan, but offered an explanation that some of his checks appeared to pay him $19.50 an hour for overtime. (Tr. 26-51).

Mr. Leon Tingle, a vocational rehabilitation counselor and President of Rehabilitation Incorporated, interviewed Claimant on May 19, 1997, after reviewing his medical records and functional capacity evaluations. Mr. Tingle's first labor market survey was issued in a report dated May, 1997, and then an additional labor market survey in July, 1997. Ms. Timony Winstead, a vocational rehabilitation counselor employed by Mr. Tingle performed another labor market survey in August of 1998, after reviewing Claimant's records, but not meeting with Claimant. (EX 9-12)

In the May and July, 1997, reports Mr. Tingle opined Claimant did have the ability to return to work. Mr. Tingle identified jobs as security guards, shuttle drivers, and a parts clerk with salaries ranging from $5.00 to $8.00 an hour. The August, 1998, labor market survey revealed welding machine jobs, a sales position, and security positions ranging from $8.00 to $14.00 an hour. Mr. Tingle recommended people apply for jobs in person and not over the phone, and explained that only after a person has been offered a position is there any need to discuss work related restrictions. Mr. Tingle believes Claimant could obtain employment at light duty work earning between $8.00 and $10.00 an hour, and Ms. Winstead testified Claimant could obtain employment earning $10.00 to $15.00 an hour. (EX 9-12).

Medical Evidence

Claimant's Exhibit 15 are reports form Cooper Family Med Center where Claimant received treatment from Dr. Kevin S. Cooper, on August 17, and August 22, 1994, following an on the job injury of August 16, 1994. Claimant was diagnosed with a lumbar strain and lumbar radiculopathy and was provided a back

brace and medications. Following an MRI on August 19, 1994, which revealed a mild central disc bulge at L4-5 and L5-S1, Claimant was referred to Dr. Thomas Dempsey**,** orthopedist.

Records from Dr. Thomas Dempsey are Claimant's Exhibit 16 and reveal Claimant was first examined on August 31, 1994, complaining of low back pain and conservative treatment of heat, message, ultrasound and a refill of medication was ordered. Claimant returned on September 7, 1994, and was to continue physical therapy and rest.

On September 21, 1994, Claimant presented to Dr. John J. McCloskey, neurosurgeon, complaining of worsening pain in his low back, bilateral buttock, and posterior thigh and intermittent numbness and tingling in both feet. Dr. McCloskey's impression was of post-traumatic low back syndrome, and he recommended conservative treatment, anti-inflammatory and pain medication, and continued physical therapy. Dr. McCloskey suggested a lumbar myelogram and bone scan if Claimant's symptoms continued. (CX 1 & 17, EX 5).

Claimant returned to Dr. McCloskey on October 26, 1994, with continued complaints of pain in his back and leg and additional complaints of headaches. Dr. McCloskey prescribed Naprosyn, Tylenol #3 , and physical therapy and recommended an exercise program. A myelogram, performed on October 10, 1994, revealed lateral recess stenosis at L4 bilaterally, which Dr. McCloskey opined could account for Claimant's complaints. He anticipated Claimant would return to light duty work shortly after Thanksgiving and later to regular duty. (CX 17 & 18, EX 5).

A prescription slip from Dr. McCloskey dated October 26, 1994, reveals physical therapy was prescribed three times a week for a month. According to Physical Therapy Records, Claimant received physical therapy from September 1, 1994, to October 6, 1994, and from October 27, 1994, to November 23, 1994, at Sunbelt Physical Therapy of Lucedale. A status report from Sunbelt dated October 6, 1995, reports that Claimant received 13 physical therapy sessions but was still essentially the same. (CX 7 & 8).

Claimant returned to Dr. McCloskey on November 28, 1994, with continued bilateral buttock and left posterior thigh pain, numbness in his feet, back pain and

stiffness. Although Dr. McCloskey found degenerative changes in his films, he found nothing to justify Claimant being out of work long term. If things were not better by January, 1995, Dr. McCloskey stated he would seek a second opinion. (EX 5).

A CAT scan of Claimant's lower back on February 17, 1995, revealed mild to moderate degenerative changes. Dr. McCloskey desired a second opinion before placing Claimant at maximum medical improvement. (CX 17& 18).

Claimant was first examined by Dr. Robert E. Germann, neuro and spinal surgeon, on March 22, 1995, with complaints of low back pain, pain down both legs, and tingling and numbness in both legs. After examining Claimant and reviewing past films, Dr. Germann's impression was of discogenic low back pain and he recommended EMGs, a repeat myelogram, and nerve conduction studies. Claimant underwent testing at Singing River Hospital on April 26, 1995, and a lumbar myelogram and CAT scan revealed only minor abnormalities. Claimant returned to Dr. Germann on May 5, 1995, and his impression was of right L4-5 radiculopathy with peroneal neuropathy. Dr. Germann agreed with Dr. McCloskey's recommendation of surgery. (CX 18 &19, EX 7).

Claimant returned to Dr. McCloskey on May 24, 1995, with complaints of low back and bilateral leg pain, and numbness and tingling in his feet and big toes. Although Claimant was not anxious to have surgery, he felt that he had few options. When Claimant returned to Dr. McCloskey on June 14, 1995, with worsening of his symptoms, a lumbar laminectomy was suggested and scheduled for July 10, 1995. Claimant was removed from work. (CX 17, EX 7).

On July 10, 1995, Claimant underwent bilateral decompressive hemilaminotomoies, partial facetectomies, and foraminotomies at the L4-5 level and was reported to have tolerated the procedure well. Claimant underwent an MRI on July 14, 1995, which revealed the recent postoperative changes and a moderately prominent central herniation of the L5 disc. Claimant was discharged on July 15, 1995. (CX 18, EX 7).

Following surgery, Claimant was again examined by Dr. McCloskey on August 31, 1995, reporting that although surgery offered immediate relief, the pain at this point had returned to pre-operative levels. Claimant reported pain shooting

down his left leg and pain in the right leg beginning at the knee and going to the foot, and numbness and tingling in his lower legs and feet. An x-ray of the lumbar spine revealed mild narrowing of the L4-5 disc but no acute abnormalities. Physical therapy was prescribed and an MMI date of January 1, 1996, was anticipated. When Claimant returned to Dr. McCloskey on October 9, 1995, reporting unbearable low back and bilateral leg pain, a myelogram was recommended and performed on October 13, 1995. The myelogram revealed a potential space at the L5 level and a CT scan revealed no abnormalities. (CX 17 & 18, EX 7).

On December 18, 1995, Claimant was evaluated by Dr. Henry C. Mostellar, Jr., neurosurgeon, following a referral by Dr. McCloskey. Claimant complained of pain in his low back, left and right leg, and burning pain in his heel, as well as tingling in both feet and legs. Dr. Mostellar opined Claimant suffered from congenital lumbar stenosis, degenerative lumbar disc disease, cervical and lumbar postop decompressive laminectomy, and chronic pain syndrome. Dr. Mostellar was not sure further surgery would be helpful, but recommended medication, a TENS unit, and an epidural steroid block. Without the above regimen, Dr. Mostellar opined Claimant to have reached MMI with a 5% permanent partial impairment. (EX 4).[2]

On March 7, 1996, Claimant returned to Dr. McCloskey, who reported a recent myelogram and electrical studies revealed nothing definite. Dr. McCloskey found Claimant to have reached MMI with a 10% permanent partial physical impairment of his entire body. Claimant was not to return to heavy or strenuous work and was restricted from all ladder climbing and frequent stair climbing. Medications and a TENS unit were prescribed. (CX 17).

A Functional Capacities Evaluation was performed by Noel Phillips Fell, physical therapist at Sunbelt Physical Therapy, on May 1 and 2, 1996, which noted that Claimant would not be able to return to his previous employment at that time. A Second Functional Capacities Evaluation was performed on July 23, 1996, which determined Claimant could not return to his previous employment but had the ability

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[2] In June, July, and September of 1991, Claimant had been treated by Dr. Frank W. Cope, a colleague of Dr. Mostellar's for injuries to Claimant's neck and arm, and these records are included in Employer's Exhibit 4.

to work at "light medium work". Claimant was restricted from lifting more than 35 pounds occasionally, 15 pounds frequently, and 7 pounds constantly. (CX 9 & 13, EX 8 & 14).

On May 27, 1996, Claimant returned to Dr. McCloskey reporting an injury from the functional capacity evaluation, where he felt a sharp, stabbing pain in his back and was unable to get up off of the floor. Dr. McCloskey ordered an MRI to recheck his lower back for new injuries unless his complaints resolved. On July 2, 1996, Dr. McCloskey reported that the test results revealed no re-injury, but only post-operative changes. (CX 17, EX 5)

On March 3, 1998, Dr. McCloskey released Claimant to return to work with permanent restrictions of no lifting greater than 35 pounds and Claimant was to limit bending, squatting, twisting, and standing. (CX 17).

Other Evidence

Employer's First Report of Injury is Employer's Exhibit 1, and reports that Najan Contractors, Employer, was first notified of the August 16, 1994, injury on that day. Claimant was welding at Ham Marine when he injured his lower back and was earning $13 an hour at the time.

Claimant was employed by Timberland Forest Products, Inc., earning $240.00 a week from October 10, 1997, to November 28, 1997, for a total of $1,920.00. (CX 21).

A note from Phyllis Elmore of Sam's Fabricating and Welding, states that Claimant was employed at Sam's the last week in November, 1997, and the first week in December, 1998, earning $328.40 a week.

An Employee Quick Report from Sun Manufacturing is Employer's Exhibit 14, and shows Claimant's earnings from Sun from March 12, 1998, to July 2, 1998, totaled $5,965.49. This exhibit also contains Sun Manufacturing's Plant Respiration Program, Health & Safety Program, and other policy memorandum. An Employee Status Report reveals Claimant was hired by Sun Mfg. on March 2, 1998, and was laid off on June 22, 1998, due to a reduction of force.

Employer's Exhibits 9 through 12 include Labor Market Surveys conducted by Rehabilitation, Inc. Following a May 19, 1997, interview and testing of Claimant, Mr. Leon Tingle, the vocational rehabilitation counselor, issued a May 30, 1997, report indicating employment opportunities were available within Claimant's restriction and abilities, earning from $4.75 to $6.14 an hour. Positions included sorter, assembly worker, fast food worker, automobile detailer, cashiers, stockers, auto part clerks, custodian, delivery drivers, lubrication technician, baggers, and security guards. The next labor market survey results were reported on July 8, 1997, and positions were identified earning $4.75 to $7.50 an hour as security guards, shuttle bus driver, parking attendant, cashier, auto part clerk, housekeepers, and locksmith trainee. The final labor market survey results were issued in a report dated August 14, 1998, and identified positions in welding, security, and car sales from employers who were hiring or anticipated hiring soon and paid from $8 to $11 an hour. Additional positions were identified with employers who periodically hire and included welding and welding sales representative positions paying $9 to $15 an hour. (EX 9-12).

Findings of Law and Fact

Causation

Section 20(a) of the Act provides Claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989). Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. Del Vecchio v. Bowers, 296 U.S. 280 (1935).

In this instance, the parties have stipulated that an accident occurred in the course and scope of Claimant's employment on August 16, 1994. Based upon the medical records in evidence, Claimant has established the existence of injuries which could have been caused by the on-the-job accident of August 16, 1994. Not a single physician denies the connection between Claimant's injuries and the accident. Claimant reported the injury to his lower back either the day of or the day

following the accident and since that time his complaints have remained consistent and his treatment has been for a lumbar injury. Having invoked the presumption, the burden now shifts to Employer.

Employer has offered no evidence to deny the relation between Claimant's injury and his on-the-job accident. Not a single medical report offered into evidence disputes the cause of Claimant's injury, and Claimant's credible testimony that his suffering began with his accident has not been refuted. There are no reports of pre-existing lumbar injuries, nor are there any contentions of malingering on the part of Claimant.

Based upon the foregoing, it is my finding Employer has failed to rebut the presumption with substantial evidence. However, even if Employer had met its burden, when weighed as a whole the evidence supports a finding that Claimant's injuries are related to the accident of August 16, 1994.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). Id. At 60. Any disability before reaching MMI would thus be temporary in nature. In this instance, the parties have stipulated, and I find, Claimant reached MMI on March 7, 1996, and therefore any compensation awarded after that date will be permanent in nature.

The question of extent of disability is an economic as well as medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); N.O. (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991).

Issues relating to nature and extent do not benefit from the Section 20 presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident. In this instance, I find Claimant was temporary totally disabled from August 17, 1994, until March 7, 1996 (date of MMI); permanently totally disabled from March 8, 1996, until May 29, 1997; and permanently partially disabled from May 30, 1997, and continuing.

Claimant has presented a prima facie case for total disability as he has proven that he is unable to return to his previous employment. Dr. McCloskey placed permanent restrictions upon Claimant when he placed Claimant at MMI on March 7, 1996, and no physician has opined Claimant to be able to return to his former employment. Additionally, the functional capacities evaluations (FCE's) performed in May and July, 1996, opined Claimant could not return to his former employment. Finally, Claimant's credible testimony has established that following his accident he was unable to perform the type of welding he had been performing for Najan because it involved crawling into small spaces, something he is no longer able to do for extended periods of time.

Based upon the opinion of Dr. McCloskey, the support of the first FCE and Claimant's testimony, Claimant has established a prima facie case for total disability and the burden has shifted to Employer to show the existence of suitable alternative employment. In this case, I find Employer met its Turner burden, as of May 30, 1997.

The first labor market survey performed was reported on May 30, 1997, and included a list of positions all within Claimant's restrictions and abilities as identified by Dr. McCloskey in March of 1996, and the July, 1996, FCE. Dr. McCloskey opined Claimant was unable to return to heavy employment, could not engage in vertical climbing and must limit his stair climbing. The last FCE of July, 1996, placed Claimant in the light to medium job classification. Claimant has not offered any testimony that he was unable to work following May 30, 1997, or that the positions identified in the May, 1997, labor market survey were beyond his abilities. Therefore, as of May 30, 1997, and continuing until July 7, 1997, I find

Claimant was permanently partially disabled with a residual wage earning capacity of $4.75 an hour[3].

The next labor market survey performed on July 8, 1997, reveals employment opportunities paying slightly higher wages, with an average of about $5.00 an hour. Because, again, Claimant has not offered any testimony to refute the availability or suitability of the employment items listed, I find Claimant's compensation from July 8, 1997, through October 9, 1997, should be reduced by Claimant's residual wage earning capacity of $5.00 an hour.

As of October 10, 1997, Claimant's residual wage earning capacity increased to $6.00 an hour when Claimant was employed by Timberland Forest Products earning that amount. Therefore, Claimant's compensation from October 10, 1997, through November 28, 1997, should be reduced by Claimant's residual wage earning capacity of $6.00 an hour.

From November 29, 1997, until present and continuing, I find Claimant's permanent partial disability should be reduced by Claimant's residual wage earning capacity of $9.00 an hour. In the end of November Claimant obtained a welding position at Sam's Fabricating earning $9.00 an hour, and demonstrated his continuing ability to earn $9.00 an hour when following his layoff from Sam's he obtained employment with Sun Manufacturing also at $9.00 an hour. Although a third labor market survey identified jobs ranging from $9 to $15 an hour, I place little weight on Ms. Winstead's evaluation because she did not ever meet Claimant before determining the suitability of the identified employment opportunities. Of the identified welding positions which were clearly suitable to Claimant, the wages ranged from $8 to $10 an hour. Therefore, I find that the $9 an hour job obtained by Claimant was representative of the appropriate positions identified in this labor market survey.

Finally, although Claimant was laid off from Sam's Fabricating in December and did not regain employment until March, and was again laid off from Sun Mfg. on July 12, 1998, Claimant's disability during the layoffs and continuing should

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[3] The labor market survey provided positions paying $4.75 to $6.14 an hour, however, $4.75 was the most common hourly earning, and therefore, I have used that figure as Claimants' wage earning capacity.

remain partial. Claimant admits that both layoffs were due to a reduction in the workforce and had nothing to do with Claimant's injury. An employer is not a long-term guarantor of employment. Olsen v. Triple A Mach. Shops, 25 BRBS 49 (1991). A person who has regular and continuous post-injury employment "must take chances on unemployment like anyone else." Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649, 658 (1979). Because Claimant returned to employment at $9.00 an hour twice before his final layoff, and because Claimant admits that his layoff did not involve his injury, I find Claimants' partial disability to be reduced by his residual wage earning capacity of $9.00 an hour, both during and following Claimant's layoffs.

Average Weekly Wage

Claimant worked for employer from January 27, 1994, and continued on and off for a total of eleven pay periods prior to his accident on August 16, 1994. His gross earnings were $7,713.63.

Both parties appear to agree to the use of Section 10(c) in arriving at Claimant's average weekly wage. At issue is the inclusion of one pay period in which Claimant earned gross wages of $1,524.25, a relatively high amount when compared to Claimant's other weekly wage earnings. Employer argues that this figure was a aberration and should not be included in the average. Claimant, on the other hand, argues that there is no evidence he did not earn the amount stated although he has no specific recollection of the pay period in question.

There is simply no evidence in the record which would allow me to ignore that week's earnings. Employer relies on Claimant's testimony that he does not recall receiving a check in that amount, however, just because Claimant does not recall the event does not mean it did not happen. The business records evidencing the payment are records provided by Najan Contractors, which I assume were kept in the course of business, and there is nothing in evidence to refute that the payment was valid. Therefore the gross wages of $1,524.25 for the week of August 11, 1994, are included in the determination, rendering an average weekly wage of $701.24[4].

[4] Because I am including the week in dispute, I am dividing Claimant's total earnings over the 11 week period, ($7,713.63) by 11 weeks which equals $701.24.

Conclusion

Based upon the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following order:

Order

It is hereby **ORDERED** that:

1. Employer shall pay to Claimant compensation for his temporary total disability, from August 16, 1994, to March 7, 1996 (date of MMI), based upon the average weekly wage of $701.24;

2. Employer shall pay to Claimant compensation for his permanent total disability, from March 8, 1996, to May 29, 1997, based upon the average weekly wage of $701.24;

3. Employer shall pay to Claimant compensation for his permanent partial disability, from May 30, 1997, to July 7, 1997, based upon the average weekly wage of $701.24, reduced by Claimant's residual wage earning capacity of $4.75 an hour, or $174.80 a week[5];

4. Employer shall pay to Claimant compensation for his permanent partial disability, from July 8, 1997, to October 9, 1997, based upon the average weekly wage of $701.24, reduced by Claimant's residual wage earning capacity of $5.00 an hour, or $184.00 a week[6];

5. Employer shall pay to Claimant compensation for his permanent partial disability, from October 10, 1997, to November 28, 1997, based upon the average

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[5]Mindful of the fairness concerns expressed in Richardson v. General Dynamics Corp., 23 BRBS 327, 330 (1990), Claimant's subsequent wages are adjusted to reflect their value at the time of Claimant's November 1992 injury. The National Average Weekly Wage (NAWW) for August, 1994 was $369.15, for May and July, 1997 the NAWW was $400.53, and for October and November, 1997 the NAWW was $417.87. Thus, the 1994 NAWW was approximately 92% of the May and July, 1997 NAWW, and 88% of the October and November, 1997 NAWW. Therefore, the wages have been adjusted accordingly.

[6] See Footnote 5 Supra.

weekly wage of $701.24, reduced by Claimant's residual wage earning capacity of $6.00 an hour, or $211.20 a week[7];

6. Employer shall pay to Claimant compensation for his permanent partial disability, from November 29, 1997, and continuing, based upon the average weekly wage of $701.24, reduced by Claimant's residual wage earning capacity of $9.00 an hour, or $316.80 a week[8];

7. Pursuant to Section 7 of the Act, Employer shall be responsible for Claimant's reasonable and necessary medical expenses;

8. Employer shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984);

9. Counsel for Claimant, within 20 days of receipt of this ORDER, shall submit a fully supported fee application, a copy of which must be sent to opposing counsel who shall then have 10 days to respond with objections thereto. See, 20 C.F.R. §702.132; and;

10. All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this day of , 1998, at Metairie, Louisiana.

C. RICHARD AVERY
Administrative Law Judge

CRA:ac

[7] See Footnote 5 Supra.

[8] See Footnote 5 Supra.